John Denis de Silva v Crescent Court Management Corp

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S6–24–2340 OF 2004
ABDUL MALIK ISHAK J
3 MARCH 2006

Civil Procedure — Injunction — Application for — Against management corporation for preventing owner from parking within premises of apartment — — Whether injunction should be allowed

Civil Procedure — Service — Service of documents — Delay — Whether court delay due to festive occasions acceptable —

Land Law — Management corporation — Power to prevent entry — Non payment of maintenance charges — Whether management corporation could prevent owner of unit from parking within premises of apartment — Strata Titles Act 1985 ss 52, 53, 53A & 75

Land Law — Strata title — Accessory parcel — Parking bay — Whether owned by unit owner or allocated by management corporation

Land Law — Strata title — Maintenance charges — Non payment — Remedies — Whether management corporation could clamp water supply and prevent owner of unit from parking within premises of apartment — Strata Titles Act 1985 ss 52, 53, 53A & 75

The plaintiff was the owner and resident of a condominium unit at the Crescent Court ('the unit'). At all times that the plaintiff owned the unit, he parked his motor car ('the motor car') at bay 106 of the Crescent Court condominium complex. On 25 September 2004, the plaintiff's motor car while displaying the Crescent Court condominium complex car park sticker was prevented entry and the right to park at bay 106 on the ground that he had not paid his monthly maintenance charges. Being a registered proprietor of his condominium unit and having the proprietary interest to car park bay 106, the plaintiff sought for an interim injunction to be issued against the defendant to restrain the defendant from preventing the plaintiff from entering the apartment project in his motor car and preventing the plaintiff from parking his motor car at car park bay 106.

On 2 November 2004, the court granted an ex parte injunction in favour of the plaintiff. By way of a preliminary objection, the defendant took umbrage to the fact that the plaintiff did not, up to 19 November 2004, serve the ex parte injunction

order on the defendant and this meant, according to the defendant, that the plaintiff had failed to comply with O 29 r 1(2BA) of the Rules of the High Court 1980 ('the RHC'). The plaintiff explained that the delay in the service of the ex parte injunction order was entirely because of the court's delay in returning the sealed copy late due to the Deepavali and Hari Raya Puasa.

It was argued by the learned counsel for the defendant, that: (1) in the event the injunction was granted, the defendant would suffer great injustice in that it would create a class of persons who could openly declare that they would not pay the monthly maintenance charges and yet be entitled to all the benefits of the common area within the defendant's premises at the Crescent Court condominium complex; and (2) the plaintiff did not purchase the parking bay 106, it was only allocated to the plaintiff. Upon allocation, the parking bay 106 was to be liable to be relocated if the management council so desires in the larger interest of the management corporation.

Held, granting the application:

(1) The court took judicial notice that during the festive occasions particularly during the Deepavali and the Hari Raya Puasa breaks of 2004 many court officers were on leave (see para 3). Thus, the sealed copy of the ex parte injunction order was extracted late and with the result that it was served late on the defendant. The defendant's preliminary objection was dismissed (see para 5).

(2) Since no concrete attempt to comply with the Strata Titles Act 1985 in recovering monies due to the defendant had yet to be initiated by the defendant nor any evidence of doing so being presented by the defendant, the policy argument advanced by the defendant remains unfounded. The unilateral act of preventing entry based on monies purportedly owing and the issuance of the final notice emanating from the defendant without resort to court actions were ultra vires ss 52, 53, 53A and 75 of the Strata Titles Act 1985 (see para 23).

(3) In the absence of any evidence of a special resolution making the house rules a by-law in the Crescent Court condominium complex, all references and executions of house rules unilaterally made by the defendant must be deemed to be void ab initio because they were ultra vires the procedures and powers of the management corporation under the Strata Titles Act 1985. That being the case, the defendant had certainly no right whatsoever to re-allocate car park bays to the buyers of the Crescent Court condominium complex in general and to the plaintiff in particular (see para 28).

(4) The plaintiff had a proprietary interest in land over the car park bay 106. As the registered proprietor of the unit and the unit being unassigned to any other party, the plaintiff clearly had the ownership or the legal title over the unit and the proprietary interest in the car park bay 106 flowed with that of the unit (see para 29).

(5) The defendant's interest in preventing the entry of the plaintiff's motor car was solely for monetary purposes and it had no relation whatsoever to the

proprietary interest of the plaintiff. The Crescent Court condominium complex with strata titles duly issued and with an incorporated management corporation was bound by the procedures as set out in the Strata Titles Act 1985 in particular ss 52, 53, 53A and 75. The Strata Titles Act 1985 clearly specifies the procedures the defendant must adhere to in recovering whatever sums due to it and in what proportions payable to the defendant by an owner of a particular unit that had been issued with a strata title. Sadly, the defendant had clearly not adhered to these procedures and had blatantly proceeded to interfere with the plaintiff's enjoyment of his legal ownership to said unit and the proprietary interest to car park bay 106 (see para 32).

(6) The balance of convenience lies in preserving the status quo of the parties and that would be to allow the plaintiff's unrestricted access into the compound of the Crescent Court condominium complex when he drives his motor car with a valid motor car sticker and to allow him to enjoy his unit without having to suffer the clamping of his water supply by the defendant until the merits of this case was litigated (see para 42(7)).

(7) Even if the plaintiff do not pay his water charges and do not display and affix a valid motor car sticker to the windscreen of his motor car, he should be allowed entry into the compound of the Crescent Court condominium complex while driving his motor car and he too should be allowed to park his motor car at the car park bay 106 that had been allocated to him and over which he had a proprietary interest and he too should be given the right of access to his unit, being the holder of an indefeasible title, without fear that his water supply would be clamped by the defendant and the remedy for the defendant would be by way of filing an action for the recovery of the debt against the plaintiff in any court of competent jurisdiction for whatever monies that were due to the defendant from the plaintiff and it was for these reasons, on the balance of convenience, that the status quo should be preserved in favour of the plaintiff (see para 42(8)).

[Bahasa Malaysia summary

Plaintif adalah pemilik dan penghuni satu unit kondominium di Crescent Court ('unit tersebut'). Pada setiap masa plaintif memiliki unit tersebut, beliau meletakkan keretanya ('kereta tersebut') di ruang 106 kompleks kondominium Crescent Court. Pada 25 September 2004, kereta plaintif yang mempamerkan pelekat kereta kompleks kondominium Crescent Court telah dihalang daripada masuk dan hak untuk meletak kereta di ruang 106 atas alasan bahawa beliau tidak dapat membayar caj penyelenggaraan bulanan beliau. Beliau yang merupakan tuanpunya berdaftar unit kondominiumnya dan mempunyai kepentingan proprietari terhadap ruang letak kereta 106, plaintif telah memohon satu injunksi interim dikeluarkan terhadap defendan untuk menyekat defendan daripada menghalang plaintif daripada memasuki projek apartmen dalam keretanya dan menghalang plaintif daripada meletak keretanya di ruang letak kereta 106.

Pada 2 November 2004, mahkamah telah memberikan satu injunksi ex parte menyebelahi plaintif. Melalui satu bantahan awal, defendan tersinggung dengan fakta bahawa plaintif tidak, sehingga 19 November 2004, menyampaikan perintah

injunksi ex parte tersebut ke atas defendan dan ini bermaksud, menurut defendan, bahawa plaintif telah gagal untuk mematuhi A 29 k 1(2BA) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Plaintif menjelaskan bahawa kelewatan penyampaian perintah injunksi ex parte sepenuhnya disebabkan oleh kelewatan mahkamah mengembalikan salinan bermeterai itu lambat kerana perayaan Deepavali dan Hari Raya Puasa.

Ia dihujahkan oleh peguam bijaksana bagi pihak defendan, bahawa: (1) sekiranya injunksi diberikan, defendan akan mengalami ketidakadilan di mana ia akan membentuk satu kelas untuk mereka yang secara terbuka menyatakan bahawa mereka tidak akan membayar caj-caj penyelenggaraan bulanan dan masih layak mendapat semua faedah kawasan umum dalam premis defendan di kompleks kondominium Crescent Court; dan (2) plaintif tidak membeli ruang letak kereta 106, ia hanya diperuntukkan kepada plaintif. Selepas peruntukan itu, ruang letak kereta 106 boleh ditempatkan semula jika majlis pengurusan berhasrat sedemikian demi kepentingan meluas badan pengurusan.

Diputuskan, membenarkan permohonan tersebut:

(1) Mahkamah mengambil notis kehakiman bahawa semasa musim perayaan khususnya waktu cuti Deepavali dan Hari Raya Puasa 2004 kebanyakan pegawai mahkamah bercuti (lihat perenggan 3). Oleh itu, salinan bermeterai perintah injunksi ex parte dikeluarkan lambat dan akibat itu ia telah disampaikan lewat ke atas defendan. Bantahan awal defendan telah ditolak (lihat perenggan 5).

(2) Memandangkan tiada percubaan kukuh untuk mematuhi Akta Hakmilik Strata 1985 untuk mendapat balik wang yang perlu dibayar kepada defendan masih belum diusahakan oleh defendan mahupun apa-apa keterangan berbuat demikian dikemukakan oleh defendan, hujah polisi yang diutarakan oleh defendan tidak berasas. Tindakan satu pihak yang menghalang masuk berdasarkan wang yang dikatakan terhutang dan pengeluaran notis terakhir yang datang daripada defendan tanpa merujuk kepada tindakan mahkamah adalah ultra vires ss 52, 53, 53A dan 75 Akta Hakmilik Strata 1985 (lihat perenggan 23).

(3) Dengan ketiadaan apa-apa keterangan satu resolusi khas membuat peraturan rumah satu undang-undang kecil di kompleks kondominium Crescent Court, semua rujukan dan pelaksanaan peraturan rumah yang dibuat oleh pihak defendan sahaja hendaklah dianggap tidak sah ab initio kerana ia adalah ultra vires prosedur dan kuasa badan pengurusan di bawah Akta Hakmilik Strata 1985. Jika begitu keadaannya, defendan tidak mempunyai hak langsung untuk memperuntukkan semula ruang letak kereta kepada pembeli-pembeli kompleks kondominium Crescent Court secara amnya dan kepada plaintif khususnya (lihat perenggan 28).

(4) Plaintif mempunyai kepentingan ketuanpunyaan dalam tanah ke atas ruang letak kereta 106. Sebagai tuan punya berdaftar unit tersebut dan unit tersebut tidak diperuntukkan kepada mana-mana pihak lain, plaintif dengan jelas

mempunyai milikan atau hak milik sah ke atas unit tersebut dan kepentingan proprietari dalam ruang letak kereta 106 juga terangkum dalam unit tersebut (lihat perenggan 29).

(5) Kepentingan defendan dalam menghalang masuk kereta plaintif adalah semata-mata kerana tujuan kewangan dan ia tiada kaitan langsung dengan kepentingan proprietari plaintif. Kompleks kondominium Crescent Court dengan hakmilik strata telahpun dikeluarkan dan dengan adanya badan pengurusan yang ditubuhkan adalah terikat dengan prosedur-prosedur sebagaimana yang ditetapkan dalam Akta Hakmilik Strata 1985 khususnya ss 52, 53, 53A and 75. Akta Hakmilik Strata 1985 jelas menetapkan prosedur-prosedur di mana defendan perlu patuhi untuk mendapat balik jumlah wang yang terhutang kepadanya dan dalam perkadaran yang perlu dibayar kepada defendan oleh seorang pemilik suatu unit tertentu yang telah dikeluarkan hak milik strata. Malangnya, defendan jelas tidak mematuhi prosedur-prosedur tersebut dan terang-terangan masih mengganggu kemudahan milikan sah plaintif terhadap unit tersebut dan kepentingan proprietari terhadap ruang letak kereta 106 (lihat perenggan 32).

(6) Imbangan kesesuaian terletak dalam mengekalkan status quo pihak-pihak dan ia akan membenarkan plaintif jalan masuk tanpa had ke dalam kawasan kompleks kondominium Crescent Court apabila beliau memandu keretanya dengan pelekat kereta yang sah dan untuk membenarkan beliau menikmati unitnya tanpa mengalami sekatan bekalan air oleh defendan sehingga merit kes ini dibicarakan (lihat perenggan 42(7)).

(7) Jikapun plaintif tidak membayar caj airnya dan tidak mempamerkan dan melekatkan pelekat kereta pada cermin depan keretanya, beliau patut dibenarkan masuk ke dalam kawasan Kompleks kondominium Crescent Court semasa memandu keretanya dan beliau juga patut dibenarkan meletak keretanya di ruang letak kereta 106 yang telah diperuntukkan kepadanya dan yang mana beliau mempunyai kepentingan proprietari dan beliau juga patut diberikan hak masuk ke unitnya, kerana adalah pemegang hakmilik yang tidak boleh disangkal, tanpa bimbang bekalan airnya akan disekat oleh defendan dan remedi untuk defendan adalah melalui pemfailan satu tindakan untuk mendapat balik hutang terhadap plaintif dalam mana-mana mahkamah yang mempunyai bidang kuasa kompeten untuk wang yang terhutang kepada defendan daripada plaintif dan oleh sebab alasan-alasan tersebut, atas imbangan kesesuaian, status quo tersebut patut dikekalkan menyebelahi plaintif (lihat perenggan 42(8)).]

Notes

For a case on accessory parcel, see 8(2) *Mallal's Digest* (4th Ed, 2003 Reissue) para 4098.

For cases on application for injunction, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 2550–2562.

For cases on management corporation generally, see 8(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2941–2947.

For cases on service of documents, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 5564–5571.

Cases referred to

Assets Co v Mere Roihi [1905] AC 176 (refd)
Boyd v Mayor of Wellington (1924) NZLR 1174 (refd)
Bruton v London & Quadrant Housing Trust (1998) QB 834 (refd)
Burns v Edman [1970] 2 QB 541 (refd)
Creative Furnishing Sdn Bhd v Wong Koi [1989] 2 MLJ 153 (refd)
Creelman v Hudson Bay Insurance Co [1920] AC 194 (refd)
DPP v Hynde [1998] 1 All ER 649 (refd)
Dennis v White [1916] 2 KB 1 (refd)
FCT v Orica Ltd (1998) 154 ALR 1, 72 ALJR 969 (refd)
Fels v Knowles (1906) NZLR 604 (refd)
Huth v Huth [1915] 3 KB 32 (refd)
Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193 (refd)
National Provincial Bank Ltd v Ainsworth [1965] AC 1175 (refd)
Ng Hee Thoong & Anor v Public Bank Berhad [1995] 1 MLJ 281 (refd)
Nye v Niblett [1918] 1 KB 23 (refd)
Oxford Poor Rate Case, Re (1857) 8 E & B 184 (refd)
Preston-Jones v Preston-Jones [1951] AC 391 (refd)
R v Luffe (1807) 8 East 193 (refd)
R v Simpson [1983] 1 WLR 1494 (refd)
R v Toohey; ex parte Meneling Station Pty Ltd (1982) 158 CLR 327 (refd)
R v Yap Chuan Ching (1976) 63 Cr App R 7 (refd)
Schultz v Corwill Properties Pty Ltd (1969) 90 WN (Pt 1)(NSW) 529 (refd)
Yanner v Eaton (1999) 166 ALR 258 (refd)

Legislation referred to

Conveyancing (Strata Titles) Act 1961 [NSW]
Federal Territory of Labuan (Modification of Land (Subsidiary Title) Enactment) Order 1985
Rules of the High Court 1980 O 1A, O 2 rr 1(1), 3, O 29 r 1(2BA)
Sabah Land (Subsidiary Title) Enactment 1972
Sarawak Strata Titles Ordinance 1995
Strata Titles Act 1985 ss 4, 6(1), 10(4), (5), 15(2)(c), (d), 16(1)(b), 19, 20, 21, 22, 23, 34(2), 39(1), (2), 42(1), 43(1), 44(4), 45, 46, 53(1), (2), 53A, 54, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 69, 70, 75(1), (2), 81, Forms 2, 3, 7A
Strata Titles (Federal Territory of Putrajaya) Rules 2003

Mahendran Ghasamoothy (Mahendran & Rernandez) for the plaintiff.
Jadadish Chandra (Arbain & Co) for the defendant.

Abdul Malik Ishak J:

INTRODUCTION

[1] This judgment should be of interest to those people who are currently staying in condominium units throughout the country particularly in the Peninsular Malaysia which include the States of Johore, Kedah, Kelantan, Malacca, Negeri Sembilan, Pahang, Penang, Perak, Perlis, Selangor, Terengganu and the Federal

Territory of Kuala Lumpur. Management corporations too are encouraged to read this judgment. The Strata Titles Act 1985 and its ramifications are set out in this judgment. Being a registered proprietor of his condominium unit and having the proprietary interest to car park bay 106, the plaintiff has the upper hand as compared to the defendant. Management corporations should comply strictly to the provisions of the Strata Titles Act 1985 without any let up. In Sabah and Sarawak, all matters pertaining to the sub-division of buildings into parcels are governed by the Sabah Land (Subsidiary Title) Enactment 1972 and by the Sarawak Strata Titles Ordinance 1995 respectively. In Labuan, strata titles are governed by the Federal Territory of Labuan (Modification of Land (Subsidiary Title) Enactment) Order 1985 vide PU(A)372/1985 which came into effect on 16 April 1984. Whereas in regard to Putrajaya, in exercise of the powers conferred by s 81 of the Strata Titles Act 1985, the Minister makes the Strata Titles (Federal Territory of Putrajaya) Rules 2003 and it came into operation on 9 January 2003. This judgment concerns strata titles in Peninsular Malaysia and it puts into sharp focus the Strata Titles Act 1985. The management corporations which consist of all the owners of the parcel units are the medium through which the parcel owners control and manage the strata schemes. The management corporations are responsible for a variety of things. For instance, they are responsible for the maintenance and management of the common properties, namely, open spaces, lifts, corridors, staircases, swimming pools, badminton courts, tennis courts, squash courts, gardens and other varied community facilities. The parcel units in respect of which individual titles have been issued and registered would be maintained by the registered proprietors. In maintaining and managing the common facilities, the management corporations must abide strictly to the Strata Titles Act 1985.

[2] Now, by way of encl 3, the plaintiff sought for the following orders:

(1) An interim injunction to be issued against the defendant to restrain the defendant, its servants and/or its agents from:

(a) preventing the plaintiff from entering the apartment project known as the Crescent Court located at the district of Wilayah Persekutuan, in the town of Kuala Lumpur at Lot No 356 s 95 under permanent title 17371 ('the said apartment') in his motor car bearing registration number WFP 7528

(b) preventing the plaintiff from parking his motor car bearing registration number WFP 7528 at car park bay 106 of the said apartment;

(c) disrupting or disconnecting the plaintiff's water supply other than with the lawful authority arising from outstanding water bill payments or legitimate water works or maintenance; and

(d) condoning such acts by any other third party or resident in the said apartment to prevent the plaintiff's entry with his motor car bearing registration number WFP 7528 into the said apartment and/or preventing the plaintiff from parking his motor car at car park bay 106 and/or disconnecting or obstructing the plaintiff's water supply without just cause.

(2) A date for the hearing of the inter partes interlocutory injunction for the orders as sought for above to be fixed 21 days from the date of this exparte order, if granted.

(3) The costs of this application be costs in the cause.

(4) Such further or other relief thereto as this honourable court deems fit and proper.

[3] On 2 November 2004, this court granted an ex parte injunction in favour of the plaintiff upon the terms of encl 3. By way of a preliminary objection, the defendant took umbrage to the fact that the plaintiff did not, up to the date of the filing of enclosure 11 (that would be on 19 November 2004), serve the ex parte injunction order on the defendant and this meant, according to the defendant, that the plaintiff had failed to comply with O 29 r 1(2BA) of the Rules of the High Court 1980 ('RHC') which reads as follows:

> (2BA) The ex parte interim injunction must be served on the relevant party within one week of the date of the order granting the interim injunction, and the Court when granting the injunction must forthwith fix a date for inter partes hearing to be held before the expiry of the 21 days.

The plaintiff explained that the delay in the service of the ex parte injunction order was entirely due to the court. It was said that the court returned the sealed copy late. The plaintiff was apologetic about the whole matter. The Deepavali and the Hari Raya Puasa breaks of 2004 were instrumental for the delay because on those days the relevant court officers were on leave. Order 1A of the RHC must be read with O 2 r 1(1) of the RHC as well as with O 2 r 3 of the RHC and, when so read, the preliminary objection advanced by the defendant would come to naught. Of pertinence would be the need to have regard to the justice of the particular case and not to be shackled by any technical non-compliance of any of the rules of the RHC. Order 1A of the RHC reads as follows:

> ORDER 1A
>
> COURT OR JUDGE SHALL HAVE REGARD TO JUSTICE
>
> In administering any of the rules herein the court or a judge shall have regard to the justice of the particular case and not only to the technical non-compliance of any of the rules herein.

Order 2 r 1(1) of the RHC states as follows:

> Non-compliance with rules (O 2 r 1)
>
> (1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of any thing done or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.

And finally, O 2 r 3 of the RHC states as follows:

> Preliminary objection for non-compliance of rules not allowed (O 2 r 3)
>
> A court or judge shall not allow any preliminary objection by any party to any cause or matter or proceedings only on the ground of non-compliance of any of these Rules unless the court or judge is of the opinion that such non-compliance has occasioned a substantial miscarriage of justice.

[4] It is common knowledge that during the festive occasions particularly during the Deepavali and the Hari Raya Puasa breaks of 2004 many court officers were on

leave. It is a common phenomenon throughout the whole country. I can certainly take judicial notice of it. Certain facts are certainly beyond dispute. They are so notorious or that they are of such common knowledge that they require no proof and no evidence in rebuttal need to be advanced. Examples of judicial notice without the need to hold an inquiry are abound. The following authorities would serve as the guiding principles:

(1) *R v Luffe* (1807) 8 East 193;

(2) *Preston-Jones v Preston-Jones* [1951] AC 391 (HL);

(3) *Burns v Edman* [1970] 2 QB 541;

(4) *Re Oxford Poor Rate Case* (1857) 8 E & B 184;

(5) *Nye v Niblett* [1918] 1 KB 23;

(6) *Dennis v White* [1916] 2 KB 1;

(7) *Huth v Huth* [1915] 3 KB 32 (CA);

(8) *R v Simpson* [1983] 1 WLR 1494 (CA);

(9) *DPP v Hynde* [1998] 1 All ER 649 (CA); and

(10) *R v Yap Chuan Ching* (1976) 63 Cr App R 7 (CA).

[5] Thus, it was not surprising that the sealed copy of the ex parte injunction order was extracted late and with the result that it was served late on the defendant. For these reasons, I dismissed the defendant's preliminary objection forthwith. I must now examine the merits of the inter partes application in encl 3.

FACTS OF THE CASE

[6] The plaintiff is the owner and resident of a condominium unit known as unit 17-B of the Crescent Court condominium complex in Lengkok Tun Sambanthan, Brickfields, Kuala Lumpur ('the said unit'). The said unit remains un-encumbered and un-assigned to any party. At all times that the plaintiff owned the said unit, he parked his motor car bearing registration number WFP 7528 ('the motor car) at bay 106 of the Crescent Court condominium complex. Parking bay 106 was later allocated to the plaintiff during the first annual general meeting of the Crescent Court management corporation. The plaintiff had no problems when entering the Crescent Court condominium complex and parking his motor car at bay 106 as well as obtaining water at the said unit. Everything went well until 25 September 2004.

[7] On 25 September 2004, the plaintiff's motor car while displaying the Crescent Court condominium complex car park sticker number 001 was prevented entry and the right to park at bay 106. It seemed that this was on the instructions of the defendant. Entry was later allowed, on 25 September 2004, after some deliberation between the plaintiff and the security guards at the gate of the Crescent Court condominium complex. Entry was, however, disallowed thereafter until service of the ex parte injunction order was served on the defendant.

[8] The defendant retaliated. The defendant was most unhappy about the ex parte injunction order. On 16 October 2004, the plaintiff's wife discovered that the water supply to the said unit had also been interrupted by way of a clamp clamping the water meter. The defendant too took steps to prevent the plaintiff's motor car from entering the Crescent Court condominium complex and to clamp the water supply to the plaintiff's unit in order to recover monies purportedly due and owing to the defendant for maintenance and water charges. The water clamp was subsequently removed, later on the same day, by the defendant or its agents when no monies were found due and owing by the plaintiff to the defendant in regard to the water charges.

[9] Plagued by these inconveniences, the plaintiff had no choice but to seek recourse to this court by filing encl 3.

THE STRATA TITLES ACT 1985

[10] Strata title ownership is now fashionable in Malaysia. It has been legislated along the lines of the Australian New South Wales Conveyancing (Strata Titles) Act 1961 and it is now known as the Strata Titles Act 1985. Basically, strata title ownership would mean that the building is sub-divided into horizontal strata. This would in turn be further divided into two or more parcels thereby allowing for separate titles to be issued to each of the parcels. Section 4 of the Strata Titles Act 1985 defines the word 'parcel' in this way:

> 'parcel', in relation to a subdivided building, means one of the individual units comprised therein, which (except in the case of an accessory parcel) is held under separate strata title;

The Strata Titles Act 1985 have been upgraded to cater to the current development and the socio-economic needs of the population (see the Malaysian Parliamentary Debates (1985) Dewan Rakyat, Sixth Parliament, 3rd Session, Volume III, No 14 at 2261 to 2264 and the Dewan Negara, Sixth Parliament, 3rd Session, Volume III, No 6 at 970 to 974; and see also the Explanatory Statement to the Strata Bills 1985) by adding new provisions thereto. And these new provisions relate to:

(a) accessory parcels for car parks, stores and accommodation for employees (ss 6(1), 10(4) and (5), 34(2) and 69 of the Strata Titles Act 1985);

(b) provisional blocks in order to allow building projects to be built in stages, stage by stage (ss 16(1)(b), 19 to 23 and 70 of the Strata Titles Act 1985); and

(c) special provisions are made for low-cost strata schemes (ss 58 to 67 of the Strata Titles Act 1985).

[11] Management corporations are the conduit through which the parcel proprietors control and manage the strata schemes. Under s 39(1) of the Strata Titles Act 1985, the management corporation comes into existence upon the opening of a book of the strata register. Basically, the management corporation is a statutory creation and shall be a body corporate having perpetual succession and a common seal as postulated in s 39(2) of the Strata Titles Act 1985.

[12] Opening of a book of the strata register simply means that the Registrar of Titles or the Deputy Registrar of Land Titles for the State in relation to strata titles which are dependent on Registry titles (see s 4 of the Strata Titles Act 1985 where the word 'Registrar' is being defined) or the Land Administrator for the District in relation to strata titles which are dependent on Land Office titles (see s 4 of the Strata Titles Act 1985 where the word 'Registrar' is being defined) is required to prepare and maintain, for the purposes of the Strata Titles Act 1985, a register of strata titles to be called as the 'strata register'. The words 'strata register' are defined in s 4 of the Strata Titles Act 1985 as follows:

> 'strata register' means the register of strata titles maintained under the provisions of s 15.

[13] The strata register carries the following information:

(a) an index in Form 2 as set out in the Strata Titles Act 1985;

(b) the details as set out in Form 3 to the Strata Titles Act 1985;

(c) a copy of the certified strata plan prepared accordingly as alluded to in s 15(2)(c) of the Strata Titles Act 1985; and

(d) the register document of title to each parcel and each provisional block as alluded to in s 15(2)(d) of the Strata Titles Act 1985.

[14] Automatically, upon the opening of a book of the strata register, there shall come into existence a management corporation consisting of all the parcel proprietors including in the case of phased development, the proprietor of the provisional block or blocks as alluded to in s 39(1) of the Strata Titles Act 1985. According to s 42(1) of the Strata Titles Act 1985 the management corporation shall, on coming into existence, become the proprietor of the common property and be the custodian of the issue document of title of the lot.

[15] The duties of the management corporations are varied and far between. They concerned the daily administration that has to be maintained and managed. All the duties of the management corporations throughout the country in Peninsular Malaysia are amply set out in ss 43(1), 44(4), 45, 46, 54 and the by-laws in the Second and the Third Schedules of the Strata Titles Act 1985.

[16] All management corporations may sue and be sued (s 39(3) of the Strata Titles Act 1985). And where a sum of money is recoverable by the management corporation under the Strata Titles Act 1985 from a proprietor in respect of:

(a) money expended by the management corporation on repairs or work which a parcel proprietor, directed by any competent statutory or public authority to do, has failed to perform (s 43(2)(a) of the Strata Titles Act 1985)

(b) any contribution which a proprietor has failed to pay to the management fund (ss 45(5) and 45(5A) of the Strata Titles Act 1985); and

(c) any sum lawfully incurred by the management corporation and guaranteed by a parcel proprietor under s 52(1) of the Strata Titles Act 1985,

then those sums, if remaining unpaid, may be recovered by the management corporation by way of an action for debt in any court of competent jurisdiction as envisaged in s 53(2) of the Strata Titles Act 1985.

[17] It must also be emphasised that whatever sum is due to the management corporation shall be recoverable by the management corporation by way of an action for debt in any court of competent jurisdiction as envisaged in s 75(2) of the Strata Titles Act 1985; and before resorting to such an action, the management corporation may serve on the proprietor a written notice requesting payment of the sum due within such period as may be specified in the notice and the period shall not be less than two weeks from the date of service of the notice as envisaged in s 53(1) of the Strata Titles Act 1985; and if upon expiry of the said period, the sum or part of the sum still remains unpaid, then the management corporation may proceed to serve on the proprietor another written notice, this time demanding payment of the sum due within two weeks from the date of service of the second notice as envisaged in s 53(2) of the Strata Titles Act 1985; and, again, in the event of non-compliance, the management corporation may file a summons in any court of competent jurisdiction for the recovery of the said sum as envisaged in ss 53(2) and 75(1) of the Strata Titles Act 1985. Additionally, the sums owing may also be recovered under the Strata Titles Act 1985 by way of an attachment of the movable property of the defaulting proprietor as set out in ss 53(2) and 53A of the same Act. Furthermore, even the land administrator may, upon sworn application in writing made by any member of the council of the management corporation, issue a warrant of attachment in compliance with Form 7A of the Strata Titles Act 1985 authorising the attachment of any movable property belonging to the defaulting proprietor which may be found in the building or elsewhere in the State as envisaged under s 53A(1) of the Strata Titles Act 1985.

THE LAW ON INTERLOCUTORY INJUNCTION

[18] The classic case of *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193 (CA) should be referred to. There, Gopal Sri Ram JCA speaking for the Court of Appeal laid down the law in these lucid terms (see pp 305–306 of the report):

> To summarise, a judge hearing an application for an interlocutory injunction should undertake an inquiry along the following lines:
>
> first, he must ask himself whether the totality of the facts presented before him discloses a bona fide serious issue to be tried. He must, when considering this question, bear in mind that the pleadings and evidence are incomplete at that stage. Above all, he must refrain from making any determination on the merits of the claim or any defence to it. It is sufficient if he identifies with precision the issues raised on the joinder and decides whether these are serious enough to merit a trial. If he finds, upon a consideration of all the relevant material before him, including submissions of counsel, that no serious question is disclosed, that is the end of the matter and the relief is refused. On the other hand if he does find that there are serious questions to be tried, he should move on to the next step of his inquiry;
>
> second, having found that an issue has been disclosed that requires further investigation, he must consider where the justice of the case lies. In making his assessment, he must take

into account all relevant matters, including the practical realities of the case before him. He must weigh the harm that the injunction would produce by its grant against the harm that would result from its refusal. He is entitled to take into account, inter alia, the relative financial standing of the litigants before him. If after weighing all matters, he comes to the conclusion that the plaintiff would suffer greater injustice if relief is withheld, then he would be entitled to grant the injunction especially if he is satisfied that the plaintiff is in a financial position to meet his undertaking in damages. Similarly, if he concludes that the defendant would suffer the greater injustice by the grant of an injunction, he would be entitled to refuse relief. Of course, cases may arise where the injustice to the plaintiff is so manifest that the judge would be entitled to dispense with the usual undertaking as (to) damages (see *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1988] 3 MLJ 90). Apart from such cases, the judge is entitled to take into account the plaintiff's ability to meet his undertaking in damages should the suit fail, and, in appropriate cases, may require the plaintiff to secure his undertaking, for example, by providing a bank guarantee; and

thirdly, the judge must have in the forefront of his mind that the remedy that he is asked to administer is discretionary, intended to produce a just result for the period between the date of the application and the trial proper and intended to maintain the status quo, an expression explained by Lord Diplock in*Garden Cottage Foods Ltd v Milk Marketing Board* [1984] AC 130; [1983] 2 All ER 770; [1983] 3WLR 143 and applied in *Cheng Hang Guan*. It is judicial discretion capable of correction on appeal. Accordingly, the judge would be entitled to take into account all discretionary considerations, such as delay in the making of the application or any adequate alternative remedy that would satisfy the plaintiff's equity, such as an award of monetary compensation in the event he succeeds in establishing his claim at the trial. Any question going to the public interest may, and in appropriate cases should, be taken into account. A judge should briefly set out in his judgment the several factors that weighed in his mind when arriving at his conclusion.

TO THE HEART OF THE MATTER

[19] I will now dutifully go through the rigmarole of examining the three stages propounded by Gopal Sri Ram JCA in *Keet Gerald Francis Noel John*.

BONA FIDE SERIOUS ISSUES TO BE TRIED

[20] The learned counsel for the defendant argued along the following lines. That there was no injustice to the plaintiff if the relief sought was denied by this court. That the effect of denying the relief to the plaintiff meant that in the absence of a valid motor car sticker, the plaintiff would have to park his motor car outside the defendant's compound. Other than a slight inconvenience there really was no injustice. Alternatively, it was argued by the learned counsel for the defendant, that if the plaintiff was minded to park his motor car at the parking bay number 106, all the plaintiff has to do was to apply for a valid motor car sticker. In regard to the disruption of the water supply, it was part and parcel of the defendant's defence that the defendant did not clamp the plaintiff's water meter. It was argued that it was the plaintiff who self clamped the water meter. According to the defendant, the plaintiff should not fear the discontinuance of the water supply so long as he settled all his arrears and was up to date with the payment of the maintenance charges to his unit — referring to the said unit. Conversely, it was argued by the learned counsel for the

defendant, that in the event the injunction was granted, the defendant would suffer great injustice in that it would create a class of persons who can openly declare that they will not pay the monthly maintenance charges and yet be entitled to all the benefits of the common area within the defendant's premises at the Crescent Court condominium complex. In such a situation, there would be ill feeling between law abiding owners of the Crescent Court condominium complex and the likes of those people who behave like the plaintiff. It was argued by the learned counsel for the defendant that it would tempt other owners of the Crescent Court condominium complex not to pay their monthly maintenance charges. It would lead to a dangerous precedent. I was urged to send a loud and clear message to persons like the plaintiff who, on the one hand, do not want to honour their obligations as parcel owners but, on the other hand, run to the courts seeking assistance in the form of a mandatory injunction which allow them to enjoy the condominium's amenities managed by the management corporation without paying the maintenance charges and/or complying with the house rules. It was emphasised that the plaintiff now lives in another place known as the Palm Court and that the plaintiff's usage of only two (2) cubic metres of water per month at the Crescent Court condominium complex shows that the said unit is no longer his residential home.

[21] The plaintiff took exceptions to the submissions of the defendant. It was submitted by the learned counsel for the plaintiff that in other situations involving a younger party without visual and movement complications, there would be less complications caused in requiring the younger party to park his motor vehicle outside the condominium complex and requiring the younger party to cross the road and walk into the compound of the condominium complex. It was pointed out that according to the affidavit evidence, the plaintiff is 78 years of age and his wife is 68 years of age. By reason of the plaintiff's advanced age, I was asked to take judicial notice of the fact that the plaintiff's movements would be both restricted and slow thereby making it hazardous for him to cross a busy road especially when he carries a heavy shopping bag with him. The matter was said to be compounded further by the fact that the plaintiff is still recovering from an eye surgery and that the problems would aggravate further in bad weather. For these reasons, it was submitted that it was wrong to say that the plaintiff would not be inconvenienced or that injustice would not befall him or that the plaintiff would not be put in danger when he is required to park his motorcar outside the Crescent Court condominium complex and walk in. The impracticality of the defendant's suggestion was further enhanced by the fact that the plaintiff has an inextinguishable (as long as he remains the owner of the said unit) indefeasible title to the said unit and proprietary interest to the car park bay 106. It was emphasised that the denial of an exercise of a proprietary interest to the car park bay 106 by the defendant to the detriment of the plaintiff constituted an injustice occasioned to the plaintiff.

[22] My attention was drawn to the fact that the defendant prohibited the plaintiff's motor car correctly displaying a valid motor car sticker number 001, which has been recently replaced by the defendant with the 2005 sticker, entry into the defendant's premises. If this was not injustice, I do not know what is!

[23] In regard to the policy argument that the grant of the injunction would cause grave injustice to the defendant, I have this to say. Since no concrete attempt to comply with the Strata Titles Act 1985 in recovering monies due to the defendant has yet to be initiated by the defendant nor any evidence of doing so being presented by the defendant, the policy argument advanced by the defendant remains unfounded because the defendant seems to be uninterested in executing its rights and obligations under the law. The unilateral act of preventing entry based on monies purportedly owing and the issuance of the final notice emanating from the defendant as seen in exh 'JS1-3' of the supporting affidavit of the plaintiff in encl 5 without resort to court actions are ultra vires ss 52, 53, 53A and 75 ss 53(2) and 53A of the Strata Titles Act 1985. The final notice in exh 'JS1-3' of encl 5 was worded as follows:

FINAL NOTICE

DATE: 6th OCTOBER 2004

TO

ALL OWNERS

PLEASE TAKE NOTE THAT ALL CONTRIBUTIONS (MAINTENANCE CHARGES, WATER BILLS, REFURBISHMENT FUNDS, INSURANCE AND OTHER CHARGES) OWING TO CCMC HAVE TO BE PAID BY THE 15TH OF OCTOBER 2004.

THE MANAGEMENT MAY DISCONNECT WATER SUPPLY AND DENY ENTRY TO VEHICLES IF PAYMENTS ARE NOT MADE BY THIS DATE.

WE DO NOT BELIEVE THIS COURSE OF ACTION IS PREFERRED BUT DUE TO THE CURRENT INABILITY OF THE MANAGEMENT TO OFFER PROPER MAINTENANCE SERVICES WE ARE FORCED TO ACT MORE DECISIVELY.

PLEASE TAKE THIS NOTICE VERY SERIOUSLY.

SGD

VISVALINGAM DORAIRAJU

ON BEHALF OF THE,

MANAGEMENT COUNCIL

CRESCENT COURT MANAGEMENT CORPORATION

[24] And ss 52, 53, 53A and 75 of the Strata Titles Act 1985 are worded in this way:

The recovery of sum as debt due to management corporation

52. (1) The payment of any amount lawfully incurred by the management corporation in the course of the exercise of any of its powers or functions or carrying out of its duties or obligations shall by virtue of this section be guaranteed by the proprietors for the time being constituting the management corporation, each proprietor being liable under such guarantee only for such proportion of the money so incurred as the share units of his parcel or the provisional share units of his provisional block bear to the aggregate share units.

(2) Where any proprietor has not discharged or fully discharged his liability for the purpose of subsection (1), the management corporation shall be entitled to recover from the proprietor in any court of competent jurisdiction as a debt due to it.

(3) Where for reasons of insufficiency of fund to meet the sum guaranteed under subsection (1), the management corporation may at an annual general meeting or at an extraordinary general meeting determine the amount to be contributed by each proprietor and decide any other issue or matter relating to the settlement of the said sum.

[Am. Act A753.]

Recovery of sums due

53. (1) Where a sum becomes recoverable by the management corporation from a proprietor by virtue of paragraph 43(2)(a), subsection 45(5) or (5A) and subsection 52(2), the management corporation may serve on the proprietor a written notice requesting payment of the sum due within such period, which shall not be less than two weeks from the date of service of the notice, as may be specified in the notice.

(2) If at the end of the period specified in the notice under subsection (1) the sum or part of the sum due remains unpaid, the management corporation may serve on the proprietor a written notice demanding payment of the sum due within two weeks from the date of service of the notice; and if upon expiry of the said period, the sum due still remains unpaid, the management corporation may file a summons in any court of competent jurisdiction for the recovery of the said sum or, in addition or as an alternative to recovery under this section, resort to recovery under section 53A.

[Am. Act A753.]

Recovery of sums by attachment of movable property

53A. (1) In the like circumstances in which the management corporation may, by virtue of subsection 53(2), file a summons for the recovery of a sum which becomes recoverable as mentioned in subsection (1) of that section, the Land Administrator may, upon sworn application in writing made by any member of the council of the management corporation, issue a warrant of attachment in Form 7A authorising the attachment of any movable property belonging to the defaulting proprietor which may be found in the building or elsewhere in the State.

(2) The warrant shall be executed by a member of the council of the management corporation or by a person specially employed by the council to execute such warrants; and a person executing the warrant shall be deemed to be a public servant for the purposes of the Penal Code [Act 574].

(3) A person executing the warrant —

(a) may, in the daytime, effect forcible entry into any house or building or any part thereof for the purpose of executing the warrant; and

(b) shall, immediately after attachment, make an inventory of the property attached under the warrant and serve a notice in form 7B on the person who, at the time of attachment, was or appeared to be in possession of the property.

(4) If any person whose property is attached disputes the legality of the attachment, he may, within fourteen days of the date of attachment, apply to the Magistrate's Court having jurisdiction in the place of attachment for an order for the release of the property, and the Magistrate's Court, after making such enquiry as may be necessary, shall grant or refuse to grant the order.

(5) If the sum due is not paid within fourteen days from the date of attachment, the property attached or such portion thereof as may be sufficient to realise the sum shall be sold by public auction, unless within that period an application is made under

A subsection (4), in which case the property shall be held pending the decision of the Magistrate's Court and shall then be dealt with as the Magistrate's Court may order.

(6) If the Magistrate's Court refuses to grant an order for the release of the property, and that decision of the Magistrate's Court is reached within fourteen days from the date of attachment, the property shall not be sold before the expiry of that period.

B (7) Notwithstanding subsections (5) and (6), if the property is of a perishable nature, it may be sold at once, and in that case the proceeds of sale shall be held pending the decision of the Magistrate's Court and shall then be dealt with as the Magistrate's Court may order.

(8) In any other case, the proceeds of sale shall be applied in satisfaction of the sum due together with the costs of the attachment and sale, and any surplus and any property not C sold shall be paid or returned to the person who, at the time of attachment, was or appeared to be in possession of the property.

(9) The costs of attachment shall include the expenses of the maintenance of livestock and the custody of movable property.

(10) In this section, unless the context otherwise requires, 'proprietor', in relation to the D recovery of a sum recoverable by virtue of subsection 45(5) or (5A) from a parcel proprietor, includes any successor in title to the parcel proprietor.

(11) Where any property is sold by virtue of subsection (7) before the expiry of fourteen days from the date of attachment, the reference in subsection (4) to an order for the release of the property shall be construed as a reference to an order for the release of the proceeds E of the sale of the property

[Ins. Act A753.]

Legal proceedings

75. (1) Every application to the court under this Act shall be by summons in Chambers.

F (2) Where there is provision for a sum to be recoverable by any person or any authority from any other person or authority the sum shall be recoverable by an action for debt in any court of competent jurisdiction.

G These sections are self explanatory. They are meant to regulate the way in which substantive rights and obligations are claimed, proved and enforced. Only the court of competent jurisdiction can resolve the dispute between the two parties. The intention of our Parliament is well documented in the long title and preamble to the Strata Titles Act 1985. It states as follows:

An Act to facilitate the subdivision of building into parcels and the disposition of titles H thereto and for purposes connected therewith.

[West Malaysia and

Federal Territory – 1 June 1985,

P.U.(B)276/85]

I WHEREAS it is desired to introduce in the form of a Strata Titles Act a uniform legislation within the States of Johore, Kedah, Kelantan, Malacca, Negeri Sembilan, Pahang, Penang, Perak, Perlis, Selangor, Terengganu and the Federal Territory of Kuala Lumpur;

AND WHEREAS it is now expedient for the purpose only of ensuring uniformity of law and policy to make with respect to tenure of parcels in a building, registration of titles

relating to parcels in a building, transfer of parcels in building, leases and charges in respect of parcels in a building, and easements and other rights and interests in parcels in a building;

[25] Now, in regard to the current place of residence of the plaintiff at the Palm Court as pointed out by the defendant, that, with respect, cannot alter the indefeasible title of the plaintiff to the said unit. The plaintiff to this day still holds the indefeasible title to the said unit and he is still ordinarily a resident at the Crescent Court condominium complex. No concrete evidence has been advanced by the defendant to suggest otherwise. Even the low water usage by the plaintiff at the said unit which evidence was put in by way of a submission cannot displace the plaintiff's indefeasible title to the said unit. The strata title to the said unit has been issued in favour of the plaintiff as reflected at exh 'JS1-1' of encl 5 and that would give rise to the concept of indefeasibility. The court in *Fels v Knowles* (1906) NZLR 604 at p 620 aptly said that:

> The cardinal principle … is that the register is everything and that, except in cases of actual fraud on the part of the person dealing with the registered proprietor, such person, upon registration of the title under which he takes from the registered proprietor, has an indefeasible title against all the world.

Indefeasibility connotes conclusiveness that is given to an estate or interest directly upon registration. Upon registration it is said that the title becomes unimpeachable (*Assets Co v Mere Roihi* [1905] AC 176) or unexaminable (*Creelman v Hudson Bay Insurance Co* [1920] AC 194) simply because the State guarantees the correctness of the particulars found in the title. The court in *Frazer v Walker* [1967] 1 All ER 649 at p 652 defines the word 'indefeasibility' in this unique way:

> … it is a convenient description of the immunity from attack by adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys. The conception is central in the system of registration. It does not involve that the registered proprietor is protected against any claim whatsoever; … there are provisions by which the entry on which he relies may be cancelled or corrected, or he may be exposed to claims in personam. These are matters not to be overlooked when a total description of his rights is required; but as registered proprietor, and while he remains such, no adverse claim (except as specifically admitted) may be brought against him.

The key word here is ' registration'. Upon registration, indefeasibility comes into play. Thus, indefeasibility is given upon registration to a statutory estate and it is also given to a registered interest like a charge. Strictly speaking, under the Torrens system, until an instrument is registered, it has no effect in creating an interest or estate in land. But once it is registered by the State, the title becomes a good title subject to certain statutory and overriding exceptions. The court, in *Boyd v Mayor of Wellington* (1924) NZLR 1174 at p 1187, held the view that if ' a person gets a registered title he, not having been guilty of any fraud, his title is conclusive'. The court too, in *Schultz v Corwill Properties Pty Ltd* (1969) 90 WN (Pt 1)(NSW) 529 at p 535, held the view that the register 'establishes title'.

THE CAR PARK BAY 106

[26] The defendant do not deny that the plaintiff is the registered owner of the said unit. But the defendant held the views that the car parking bay 106 was allocated to

the plaintiff and it was not purchased by the plaintiff. According to the defendant, the plaintiff averred that he was billed for the roof that was built over the car park bays. However, the plaintiff has not given any evidence of him having made payments for the construction of the roof to cover the car park bays. According to the defendant, the costs of construction of the roof to cover the car park bays was pro-rated and all the owners paid equally. The stand of the defendant was this. That the plaintiff did not purchase the parking bay 106; it was only allocated to the plaintiff. Upon allocation, the parking bay 106 was said to be liable to be relocated if the management council so desires in the larger interest of the management corporation. In short, according to the defendant, usage of parking bay 106 is subject to the defendant's house rules as well as to the resolutions of the Annual General Meeting ('AGM') or the Extraordinary General Meeting ('EGM') of the defendant. Thus, for instance, a bay may be required for landscaping or re-alignment to cater for a greater or a fewer number of cars. There could be a host of other reasons. It was argued by the defendant that the plaintiff has no proprietary right to the parking bay 106 because he did not purchase it but rather it was allocated to him.

[27] Perhaps the nagging issue of the ownership of the allocated parking bay 106 remains a legal quandary. The plaintiff does not dispute that the parking bay 106 was allocated to him. But the plaintiff holds the view that he has an exclusive licence to use the parking bay 106 and this in turn gives him a proprietary interest over it. Evidence of the monies paid to the developer towards the shared construction of the car park roof which served as consideration towards the crystallisation of this proprietary interest has been well presented by the plaintiff in his affidavit in encl 13 that was affirmed on 13 December 2004. The letter from the plaintiff to the developer dated 7 October 1982 marked as exh 'JDDS-2' annexed to encl 13 was worded in this way:

> John Denis de Silva
>
> Apartment No 17B
>
> 16th Floor, Crescent Court
>
> off Jalan Brickfields
>
> Kuala Lumpur
>
> 7 October 1982
>
> Syarikat Harta Tanah Kresen Sdn Bhd,
>
> No 18-A, Jalan Parry,
>
> Kuala Lumpur 04-04.
>
> Dear Sir,
>
> Re: Proposed Construction of Roof Covers for Car Park
>
> at Crescent Court, Jalan Brickfields, Kuala Lumpur
>
> Apartment No 17-B
>
> ---

Your letter of 17th September 1982 refers.

I note that the roof covers are in the process of completion and also note that I have not paid the $300.00 demanded by you as my share.

I would like to refer you to my agreement dated 17 September 1979 wherein I agreed to pay 1/110 share of the cost of construction in the event the car park is covered (see paragraph 3 of the said letter of agreement drafted by you and signed by me).

I would like to put it on record that I never undertook to make progress payments and only undertook to pay 1/110's share of the cost which I am and always have been prepared to pay. Kindly let me have the Architect's Certificate of completion together with an account of total cost and my share thereof.

I dispute your right to withdraw my parking lot No. 106 which was allocated to me and in the event that you will proceed to carry out your threat contained in paragraph 3 of your letter of 17 September 1982 I shall have no choice but to apply to Court for an injunction and the costs of such application will be for your account.

I suggest you consult your legal advisors who will be able to advise you on what you can demand under the Sale and Purchase Agreement and under the agreement of 17 September 1979 as all the notices of demand which have to-date been received by me are outside the scope of our two apartments

Yours sincerely

Sgd

And another letter dated 10 February 1983 from the developer to the plaintiff marked as exh 'JDDS-3' annexed to encl 13 was worded in this way:

10 February 1983

Mr John Denis De Silva,

Apartment No 17B,

16th Floor, Crescent Court,

Off Jalan Brickfields,

Kuala Lumpur.

Dear Sir,

Re: Flat 17B, Crescent Court

Arrears of Maintenance and Other Charges

We write to refer to your letter dated 20 September 1982 and to submit the following in reply to the matters raised therein accordingly.

(1) <u>On alteration to building plans</u>

There are no alterations to the Plan but that the developers erected 2 (two) penthouses on the uppermost floors of the Building which do not affect the purchasers materially. There was no objection from you or any other purchasers then to this addition.

As to the division of the common property, you would realise that you now pay 1/110 share (instead of 1/108) of the maintenance charges which in fact benefits you. Any suggestion for a smaller fraction of the Maintenance Charges would likewise reduce your share in the common property proportionately.

A We feel any change to this could not be acceptable to the other purchasers/owners.

(2) Vacant Possession

Major cause of the delays in the construction were primary (sic)(primarily) caused by the delay in the Purchasers in accepting the increase in the building cost of the flat. Further delays were caused by the death of the late Datuk Eric Taylor. No liability on
B the Developers.

(3) Strata Titles

The company is applying for the amalgamation of various lots which is a requisite in law prior to applying for sub-division towards obtaining the strata titles. The company is now awaiting the approval of the application for the amalgamation which would take
C its normal course.

(4) Maintenance Deposit

The amount of $200 requested as deposit for maintenance charges is reasonable as it does not even amount to two months' charges.

(5) Maintenance Charges
D

Maintenance Charges are payable by every owner of the Flat ever since the inception of the Crescent Court Building and apart from the monthly fee of $110, the $200 deposit, etc, other charges incurred by the Management on provision of any new amenities or renovations/repairs to existing ones or use of water for cleaning of public areas, to quote to specific example, are pro-rated amongst the Flat owners. There is no question of any
E Flat owner not abiding by this arrangement!

(6) Short Collection on Charges

This is covered by explanation in para 5 above.

(7) Proposed Construction of Roof Cover for Cars

F You will be advised of this when we receive the certificate. However, the total cost of construction of the roof covers = $31,649.65. You will be billed your share of it accordingly in due course.

(8) Restoration of Compound Wall Lighting

The total cost is $3,165.

G Yours faithfully,

Sgd

SHARIKAT HARTA TANAH KRESEN SDN BHD

H

[28] These two letters favoured the plaintiff in its entirety. In sharp contrast, there was no evidence to the contrary that has been presented by the defendant. It is a correct assertion to say that the allocations of the car park bays by the developer to the buyers of the Crescent Court condominium complex which were later confirmed in the first AGM of the defendant are not subject to the house rules and other
I decisions by the defendant in regard to the re-allocations of car park bays because s 44 of the Strata Titles Act 1985 gives no room for the execution of other rules other than the additional by-laws obtained through a special resolution and submitted to the Director of Lands and Mines. For completeness, I will now reproduce s 44 of the Strata Titles Act 1985:

By-laws for the regulation for a subdivided building

44. (1) The by-laws set out in the Third Schedule shall, as and from the opening of a book of the strata register be in force for all purposes in relation to every subdivided building and shall not be amended by the management corporation.

(2) The management corporation may by special resolution make additional by-laws, or make amendments to such additional by-laws, not inconsistent with the by-laws set out in the Third Schedule, for regulating the control, management, administration, use and enjoyment of the subdivided building.

(3) The by-laws for the time being in force in respect of the subdivided building shall bind the management corporation and the proprietors to the same extent as if they constituted properly executed agreements —

(a) on the part of the management corporation with each proprietor; and

(b) on the part of each proprietor with every other proprietor and with the management corporation,

to observe and perform all the provisions of the by-laws.

(4) The management corporation shall —

(a) keep a record of the by-laws in force from time to time;

(b) on receipt of an application in writing made by a proprietor or by a person duly authorised to apply on behalf of a proprietor for a copy of the by-laws in force, supply to such proprietor or duly authorised person at a reasonable cost a copy of the by-laws; and

(c) on the application of any person who satisfies the management corporation that he has a proper interest in so applying, make such by-laws available for inspection

(5) No by-law is capable of operating —

(a) to prohibit or restrict the transmission, transfer, lease or charge of, or any other dealing with any parcel of a subdivided building; and

(b) to destroy or modify any easement expressly or impliedly created by or under this Act.

(5A) In subsection (5) 'easement' includes a right or obligation created by section 35.

(6) A copy of any by-laws made by the management corporation under subsection (4) and any amendment of any by-laws for the time being in force, certified as a true copy under the seal of the management corporation, shall be lodged by the management corporation with the Director within thirty days of the passing of the resolution by the management corporation approving the by-laws.

(7) The management corporation or any proprietor shall be entitled to apply to a court of competent jurisdiction —

(a) for an order to enforce the performance of, or restrain the breach of, any by-laws by: or

(b) to recover damages for any loss or injury to any persons or properties arising out of the breach of any by-laws from,

any persons bound to comply therewith, the management corporation or the administrator, and the court may make such order against any such persons, the management corporation or the members of its council, or the administrator, as the court thinks fit.

[Am.Act A753.]

The sum total of it all would be this. That in the absence of any evidence of a special resolution making the house rules a by-law in the Crescent Court condominium complex, all references and executions of house rules unilaterally made by the defendant must be deemed to be void ab initio because they are ultra vires the procedures and powers of the management corporation under the Strata Titles Act 1985. That being the case, the defendant has certainly no right whatsoever to re-allocate car park bays to the buyers of the Crescent Court condominium complex in general and to the plaintiff in particular.

[29] It must be recalled to mind that the plaintiff had been using car park bay 106 when the plaintiff took occupation of the said unit in September 1979. The first AGM of the defendant had confirmed the developer's allocation of car park bay 106 for the exclusive use of the plaintiff since September 1979. It seemed that it was the commonly accepted policy in the Crescent Court condominium complex that allocated car park bays were for the exclusive use of the parties to which the said bays were allocated to. It was also the common practice in the Crescent Court condominium complex as well as other such complexes in the country that car park bays allocated to a particular apartment or a condominium unit must follow that apartment or unit when the same was sold. Pursuant to a complaint by the other residents that covered car park bays were insufficient and some residents had to make do with uncovered car park bays, the developer proposed that a roof be constructed over the uncovered car park bays and the costs of such construction would be borne by all the residents equally. The plaintiff as alluded to earlier had paid his share of the costs and this thereby consolidated his interest in land over car park bay 106 that had been allocated to him. In my judgment, the plaintiff had a proprietary interest in land over the car park bay 106. As the registered proprietor of the said unit and the said unit being unassigned to any other party, the plaintiff clearly has the ownership or the legal title over the said unit and the proprietary interest in the car park bay 106 flowed with that of the said unit. Evidence of the proprietary interest over the car park bay 106 can be seen when the said car park bay was allocated to the plaintiff in late 1979 and the subsequent monetary payment for the roof construction over the uncovered car park bays strengthened the plaintiff's proprietary interest thereto. Lord Wilberforce in *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 attempted to define a right in rem or a proprietary interest in this way (see pp 1247–1248):

> Before a right or an interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability.

This very passage was cited by Mason J in *R v Toohey; ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 at p 342-3, 44 ALR 63, with some measure of qualified approval. But Gummon J in *FCT v Orica Ltd* (1998) 154 ALR 1, 72 ALJR 969 at p 992 was quite bold when his Lordship criticised the decisions of *Ainsworth* and *Toohey* and said that those two decisions were not concerned with the existence of a proprietary interest created under the general law of contract. The court in *Ainsworth* dealt with the development of the 'deserted wife's equity' while the court in *Toohey* considered the rights created by a certain statute.

[30] I am of the considered view that the general definition of a proprietary interest as propounded by Lord Wilberforce in *Ainsworth* is an illuminating and apt definition deserving a high degree of compliment. Mason J in *Toohey* acknowledged that the proposition of Lord Wilberforce in *Ainsworth* that a property right must be 'capable in its nature of assumption by third parties' which must necessarily mean capable of alienation, constitutes one of the essential characteristics of the right to be attached to a proprietary interest. I think that right is the right of disposition. It is a correct assertion to make, and I so make, that the interest must be capable of disposition before it will be classified as proprietary. Property, according to Gleeson CJ, Gaudron, Kirby and Hayne JJ in *Yanner v Eaton* (1999) 166 ALR 258 at p 264, ' consists primarily in control over access'. And McHugh J in *Yanner v Eaton* at p 272 describes it as a ' relationship between owner and object by reference to the power of the owner to deal with the object to the exclusion of all others, except a joint owner.'

[31] Wisdom dictates that in order to enjoy proprietary interest as distinct from merely personal interest, rights in land must be capable of third party involvement. Justice Millett LJ in *Bruton v London & Quadrant Housing Trust* (1998) QB 834 at p 845E aptly said:

> The essence of a legal estate is that it binds the whole world, not just the parties to the grant and their successors.

[32] The defendant's interest in preventing the entry of the plaintiff's motor car was solely for monetary purposes and it has no relation whatsoever to the proprietary interest of the plaintiff. In publicising the course of action to be taken by the defendant as seen in exh 'JS1-3' of encl 5 as reproduced earlier and executing the same, whatever the motives of the defendant may be, was clearly wrong in law. The Crescent Court condominium complex with strata titles duly issued and with an incorporated management corporation was bound by the procedures as set out in the Strata Titles Act 1985 in particular ss 52, 53, 53A and 75 thereof. The Strata Titles Act 1985 clearly specifies the procedures the defendant need to adhere to in recovering whatever sums due to it and in what proportions payable to the defendant by an owner of a particular unit that has been issued with a strata title. Simply put, the procedure being the issuance of two concurrent notices of demand each with a 14–day compliance period after which the claim must be referred to a court of competent jurisdiction as set out in s 53 of the Strata Titles Act 1985. And according to s 53A of the Strata Titles Act 1985 an attachment of movable property can only be done by the Land Administrator after a summons for the recovery of the sums owing has been filed in court. In addition thereto, s 75 of the Strata Titles Act 1985 makes reference to the legal proceedings that should be undertaken under the said Act. Sadly, the defendant had clearly not adhered to these procedures and had blatantly proceeded to interfere with the plaintiff's enjoyment of his legal ownership to the said unit and the proprietary interest to car park bay 106. As I said earlier, there was no averment by the defendant of any actions taken by them in harmony with the statutory requirements of the Strata Titles Act 1985. All the owners of the Crescent Court condominium complex own the common property administered by the defendant. Car park bay 106 was allocated to the plaintiff for his sole use and such allocation has been confirmed by the first AGM of the defendant.

A THE RIGHT OF UNRESTRICTED ENTRY

[33] According to the defendant there is no unrestricted right of entry. And that the ultimate say in matters of this nature lie with the management corporation like the defendant herein. The final notice as alluded to earlier notifying all the owners B of the Crescent Court condominium complex that if the maintenance charges were not paid by 15 October 2004 the defendant may disconnect the water supply and deny entry to vehicles of the respective owners. The plaintiff's complaints of being denied entry with his motor car that were said to have happened on 25 September 2004 at about 11.25am and on 13 October 2004 were categorically denied by the defendant. Interestingly, the defendant drew this court's attention to the plaintiff's C letter dated 24 May 2004 that was annexed to the affidavit in reply of the defendant in enclosure 16 marked as exh 'MU-11'. That letter was written by the plaintiff when he was holding office as chairman of the defendant. That letter certainly makes for an interesting reading material and for completeness it will now be reproduced:

D CRESCENT COURT MANAGEMENT CORPORATION

Ground Floor, Crescent Court Lengkok Tun Sambanthan,

50470 Kuala Lumpur. Tel: 22741645

Metro Security Services Sdn Bhd

E 92, Jalan Tun Sambanthan,

50470 Kuala Lumpur.

24th May 2004

Dear Sirs,

F Security Guard Services to Crescent Court

We regret to inform you that we wish to terminate currently monthly arrangement we have with you for provision of Security Guard Services to Crescent Court effective on 31 May 2004 at 8pm.

G We have informed you of out(sic)(our) complaints about the Security Guards whom you have been allocating for duty at Crescent Court on numerous occasions and despite our building Manager's discussions with you, service has not improved.

Since the beginning of 2004 we have had one Security Guard arrested for drug related offences committed on the premises of Crescent Court, four tyres of one vehicle were slashed during the night shift, two fires occurred in the common property in early morning. H These events have occurred but the Security Guards on duty were unable to give any useful information regarding these events except to report them.

Several owners have complained that no guards have been manning the gate when they took their children to school and children were found playing in the drive (sic)(driveway) and near the gate. One owner placed a phone call to the mobile phone number of your organisation to enquire where the guards were. The owner complained that he could not I move his car from his parking bay because there was a lorry blocking his car. The guards were unable to locate the owner of the lorry and when he finally emerged from the building he informed the owner that the Security Guard told him to park there.

On frequent occasions persons not in uniform manned the gate. We do not know whether they were your guards or friends of guards relieving them without your knowledge.

On Saturday 22 May 2004 just after 7pm the gate was again manned by two men not in uniform who were sitting on two chairs near the gate chatting while the gate was wide open and vehicles were coming in without hindrance resulting in several owners quarrelling with persons who had parked in their bays. The car had no sticker and should not be in the car park at all!

The Management Council can no longer wait for improved service, which, instead of improving has deteriorated, and more and more complaints have been received. A decision to terminate your service was taken by the Management Council. Please instruct the Security Guards who will be on duty on 31 May 2004 on the 8am shift to hand over to the Building Manager all records, documents and keys kept by them in the guard house before their shift ends at 8pm.

Yours faithfully,

CRESCENT COURT MANAGEMENT COUNCIL

Sgd

JD de Silva

CHAIRMAN

[34] Now, according to the defendant, the plaintiff's argument that the defendant's interest in preventing the entry of the plaintiff's motor car was solely for monetary purpose and not related to the plaintiff's proprietary interest should be seen in the context of the large majority of the owners who demand that the defendant enforce the house rules strictly and that entry should only be allowed for motor cars with valid stickers bearing in mind that the defendant had received many complaints of unauthorised persons parking their respective vehicles within the compound. It was emphasised by the defendant that the Crescent Court condominium complex is close to the Brickfields business district and due to the shortage of parking lots many office workers would park inside the complex and walk to their respective offices in Brickfields. This episode was said to be rampant and hence there was a need for the council to take drastic steps to prevent such an abuse. It was emphasised that the plaintiff himself must have had this in mind when he wrote the letter dated 24 May 2004 as reproduced earlier.

[35] The defendant argued that the plaintiff's contention that the defendant is bound by the procedures as set out in the Strata Titles Act 1985 in particular ss 52, 53 and 53A in regard to the manner of the recovery of maintenance monies owing to the defendant overlooked the fact that s 53 is worded in a discretionary manner with the operative word ' may' being inserted therein. It was submitted that the defendant and other management corporations are not bound by the strict strictures of recovery as set out in s 53 of the Strata Titles Act 1985 because it may resort and invoke to enforce its own house rules and resolutions passed at an AGM or EGM.

[36] In regard to the plaintiff's alleged enjoyment of the use of the parking bay 106, it was submitted by the defendant that the said enjoyment must be read together with the house rules and/or directives of the defendant. What use are these house rules, so posed the defendant, if they could be ignored willy-nilly? It was pointed out that all the owners need do would be to obtain a valid motor car sticker and they

would have unlimited and unrestricted usage of the parking bays allocated to them. It would be mischievous for the plaintiff to suggest that the mere fact that he is the owner of the said unit, then he should be allowed unlimited and unrestricted usage of the parking bay 106 even though his motor car do not exhibit or display a valid motor car sticker, so said the defendant. According to the defendant, to sustain such an argument would open the literal flood gates and chaos would be the order of the day. Surely, according to the defendant, this court would not want to see chaos in the running of the management corporations of condominiums and apartments in this country.

[37] A submission was made to the effect that the Strata Titles Act 1985 does not prohibit a management corporation from denying entry of motor vehicles belonging to the parcel owners who are in arrears of maintenance payments nor does the said Act say that it can do so. Ingeniously it was submitted by the defendant that since the Strata Titles Act 1985 does not prohibit it, it meant that the law permits it and the position was said to be made clearer by the house rules which expressly permits the defendant to do what it did. It was submitted by the defendant that the house rules are expressly recognised by the Strata Titles Act 1985 and all the purchasers of the stratified properties would have signed what in legal parlance would be called the deed of mutual covenant which is nothing more than an agreement inter se between the purchasers.

[38] By way of a rebuttal, the plaintiff submitted that the defendant's categorical denial of having prevented the plaintiff's entry on the various occasions as alluded to by the plaintiff constituted an attempt at bare denial. It was emphasised that the plaintiff being the resident and owner of the said unit and having displayed and affixed the correct motor car sticker to his motor car should not be denied entry. It was further submitted by the plaintiff that access to the Crescent Court condominium complex ought to be unrestricted to the owners or tenants unless a court order was obtained to say otherwise. It was the submissions of the plaintiff that the existence of the deed of mutual covenant cannot change nor modify the requirements as stipulated by the Strata Titles Act 1985 nor can the said deed do away with the provisions of the said Act. At any rate, it was pointed out that there was never a deed of mutual covenant signed by the plaintiff and the defendant even failed to exhibit the said deed in its affidavit.

ARE DAMAGES AN ADEQUATE REMEDY?

[39] As a statutory body set up under the Strata Titles Act 1985, the defendant must be bound wholly and completely by the terms of the said Act. In this case, the defendant ought to have obeyed the words of the said Act in enforcing the rights that were due to it.

[40] In regard to the maintenance charges that were due and payable, it was argued by the plaintiff that there were discrepancies in regard to the manner and method by which the alteration of the charges was done in that it was done without due adherence to the share unit divisions as required by the Strata Titles Act 1985. Furthermore, the defendant has compounded the matter further by not adhering to

the prescribed method of the recovery of funds that were due to it. While admitting that the defendant is a creature of the Strata Titles Act 1985, yet the defendant saw it fit to collect monies in ways other than that prescribed by the Strata Titles Act 1985. The defendant has failed to adhere to the provisions of the said Act and, consequently, the ' practical realities of the case' (to borrow the words of Gopal Sri Ram JCA in *Keet Gerald Francis Noel John*) seemed to suggest that it would only be just and proper that an interlocutory order in terms of encl 3 ought to be given in favour of the plaintiff.

JUSTICE OF THE CASE

[41] The defendant submitted that the justice of the case lies in not granting the injunction sought by the plaintiff. Assuming, for one moment, so says the defendant, that if the plaintiff succeeds in his application this would mean that he has a right of entry of his motor car into the Crescent Court condominium complex compound even without a valid motor car sticker. If this were to happen, so says the defendant, there would be unfairness to the other law abiding parcel owners. It would create a sense of uneasiness and other parcel owners would, in due course, become recalcitrants — by not paying their maintenance charges and yet demanding the right of entry when they drive their motor cars into the compound of the Crescent Court condominium complex. Again, it was emphasised that all the plaintiff need to do in order to have an unlimited and unrestricted use of the parking bay 106 would be to pay up the maintenance charges and obtain a valid motor car sticker. It was submitted that the plaintiff would not suffer any injustice if relief is withheld because he would still have access to his own unit save that he would have to leave his motor car outside the defendant's compound. For these reasons, the defendant submitted that this was a clear case to show that the defendant would suffer a greater injustice by the grant of an injunction and hence the same should be refused.

[42] Taking into account all those relevant matters as itemised in the case of *Keet Gerald Francis Noel John*, I must rule that the justice of the case lies in favour of continuing the injunction as obtained by the plaintiff on an ex parte basis on 2 November 2004 as reflected in the order that has been extracted and as seen in encl 9 for the following reasons:

(1) that the plaintiff, as the registered proprietor of the said unit and having legal title thereto as well as having a proprietary interest in the car park bay 106 and bearing in mind the plaintiff's age, mobility and medical conditions, certainly has an upperhand over that of the defendant and the justice of the case would lie in favour of the plaintiff as opposed to that of the defendant;

(2) that the defendant has no legal basis whatsoever to prevent the entry of motor vehicles of the other owners of the parcel units who owe maintenance fees and neither do the defendant has the legal basis to clamp the water supplies of the other owners of the parcels who owe water charges and all these would equally apply in favour of the plaintiff, and at any rate, the plaintiff has always displayed a valid motor car sticker number 001 on the windscreen of his motor car;

(3) that the defendant cannot base its decision to act unilaterally on the basis of the house rules because the house rules are ultra vires the Strata Titles Act 1985;

(4) that the harm caused to the plaintiff if the injunction is not granted can go from physical and life threatening to extreme inconvenience bearing in mind the age, mobility and medical conditions of the plaintiff;

(5) that there is no proven harm to the defendant other than being forced to comply with the provisions of the Strata Titles Act 1985 particularly ss 52, 53, 53A and 75 thereof should the injunction be granted in favour of the plaintiff;

(6) that for the defendant damages is indeed an adequate remedy whereas for the plaintiff damages can never be an adequate remedy because of the pain and suffering which the plaintiff may suffer if he is forced to park his motor car outside the compound of the Crescent Court condominium complex and walk, after negotiating a difficult crossing of a rather busy road, to his unit;

(7) that the balance of convenience lies in preserving the status quo of the parties and that would be to allow the plaintiff's unrestricted access into the compound of the Crescent Court condominium complex when he drives his motor car with a valid motor car sticker number 001 and to allow him to enjoy his unit without having to suffer the clamping of his water supply by the defendant until the merits of this case is litigated; and

(8) that even if the plaintiff do not pay his water charges and do not display and affix a valid motor car sticker to the windscreen of his motor car, he should be allowed entry into the compound of the Crescent Court condominium complex while driving his motor car and he too should be allowed to park his motor car at the car park bay 106 that has been allocated to him and over which he has a proprietary interest thereto and he too should be given the right of access to his unit, being the holder of an indefeasible title thereto, without fear that his water supply would be clamped by the defendant and the remedy for the defendant would be by way of filing an action for the recovery of the debt against the plaintiff in any court of competent jurisdiction for whatever monies that are due to the defendant from the plaintiff and it is for these reasons, on the balance of convenience, that the status quo should be preserved in favour of the plaintiff.

DID THE PLAINTIFF MAKE A FULL DISCLOSURE?

[43] In advancing the application in encl 3, the plaintiff disclosed the following salient information. That the plaintiff did not hold the position called the chairman of the defendant because that position was not provided for in the Strata Titles Act 1985. Rather, that position was created by one Dr Murigiah Uthandy for his own convenience. The plaintiff held the position of the chairman of the defendant's management committee and that these two positions are distinct and varied, a point misunderstood by the defendant.

[44] According to the plaintiff that the arrears claimed as due and owing to the defendant were wrong because a valid set-off exists for the benefit of the plaintiff as

against the defendant. There were other monies that have, to date, being paid which include the water charges. The defendant too did not deny the existence of the set-off in its affidavits.

[45] That whilst the plaintiff may have written letters to the security guard company in his capacity as the chairman of the defendant's management committee, it has no bearing on this case because the plaintiff has always displayed his valid motor car sticker number 001 on the windscreen of his motor car. That the plaintiff's appointment as the chairman of the defendant's management committee was not declared illegal or null and void by Tee Ah Sing J in Suit No S4–21–194 of 2003 between the following parties:

Crescent Court Management Corporation … Plaintiff

AND

Sahul Hamid and 11 Others … Defendants

[46] Furthermore, during the plaintiff's tenure as chairman of the defendant's management committee, the defendant had made a booking to purchase and install new lifts and these issues have no relevance in adjudicating enclosure 3. All the information regarding the plaintiff's position in the defendant's management committee and the actions taken therein have nothing to do with the plaintiff's legal title to the said unit and proprietary interest in the car park bay 106. This so called ' non-disclosures' cannot be construed as material non-disclosures bearing in mind that a great deal of information has been supplied by the plaintiff to the defendant. At any rate, any undisclosed information was not done intentionally; rather, according to the plaintiff, it was undisclosed by virtue of an oversight. According to the plaintiff, there was a notice of intention to use the affidavit in encl 2 and that notice can be seen in enclosure 8. In my judgment, every material fact has been presented by the plaintiff and there were no suppression of material facts (see *Creative Furnishing Sdn Bhd v Wong Koi* [1989] 2 MLJ 153 (SC)).

COLLATERAL ISSUES

[47] Under this head, I shall consider the following five sub-issues:

(a) Chairman of the Crescent Court management corporation

The defendant admitted that it is a creature of the Strata Titles Act 1985 and the said Act does not provide for the position of the chairman for the defendant. Yet, Dr Murigiah Uthandy who affirmed the affidavit for the defendant claimed to be chairman of the defendant. In sharp contrast, the plaintiff claimed to have been and was the chairman of the defendant's management committee and not of the defendant itself. The varied differences of these two appointments are quire significant. The Strata Titles Act 1985 do not provide for the position of chairman of the defendant.

(b) Role of Messrs Iza Ng Yeoh & Kit

The issue of Messrs Iza Ng Yeoh & Kit's existence and information as to their role was presented to this court in an obvious attempt of providing full and frank disclosure. Their role in relation to the present suit is non existent

A and unrelated. They are a valid legal firm in the eyes of the law and duly registered with the Bar Council. The plaintiff's wife by the name of Madam Izabella De Silva is not the partner of the law firm but merely a consultant. According to the plaintiff, no legal costs was incurred in the appointment of that law firm nor was anything paid to the said law firm.

B (c) Set-off claim by the plaintiff

The defendant did not deny that there was a set-off. It must therefore be deemed to be an admission (see *Ng Hee Thoong & Anor v Public Bank Berhad* [1995] 1 MLJ 281 (CA)).

C (d) Decisions taken by the defendant

The decisions taken by the defendant were ultra vires the Strata Titles Act 1985. And these decisions relate to the following matters:

(i) the decision to prevent entry of motor vehicles belonging to the owners of the parcel units and the tenants thereto;

D (ii) the decision to restrict or clamp the water supplies to the parcel units; and

(iii) the decision to give legal force to the house rules as opposed to enacting them as by-laws within the purview of the Strata Titles Act 1985.

E (e) Disconnection of water supply

The defendant's choice to make a bare denial of having clamped the water supply despite the fact that pictures of the same water clamp have been exhibited in exhibit ' JS1-2' of enclosure 5 constitutes a bad attempt in denying liability. Immediately after the defendant had issued the final

F notice as reproduced earlier, the plaintiff filed the present action and whether or not pursuant to a mistaken belief that monies were owing for the unpaid water bills, the real threat facing the plaintiff would be the possibility that the defendant may clamp the water supply again if the injunction was not given.

G

DID THE PLAINTIFF COME TO COURT WITH CLEAN HANDS?

[48] The plaintiff said he did whereas the defendant disputed it. I must rule that the plaintiff has come to court with clean hands. The following explanations

H advanced by the plaintiff would suffice:

(1) That indeed some postage and mailing of cards and stickers were done through one Helen Liew who has a business address at the Concorde Hotel. The said Helen Liew was an owner of an apartment in the Crescent Court condominium complex and she was also a management committee member at

I that time. The arrangement with Helen Liew was done above board.

(2) CCTVs' were installed and they were contributed by one of the parcel owners. These CCTVs' were installed at some vantage points. One was installed to protect the contributing owner's vehicle. Another was installed focussing on the security guards. Yet another was installed in the management office.

(3) Certain amounts were paid to MS Elevators Engineering Sdn Bhd for new lifts and this fact was known to the defendant.

(4) The plaintiff denied owing the defendant the sum of RM1,414.22 as overdue maintenance charges.

CONCLUSION

[49] In the interest of justice and on the balance of convenience, it would be ideal to maintain the status quo of the parties pending the determination of the other issues at hand by allowing the injunction to continue. For all the reasons as adumbrated above, I gave an order in terms of encl 3 prayers 1(a), 1(b), 1(c), 1(d) and (3) thereto.

Application allowed.

Reported by Loo Lai Mee